No. 11020.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALLEN I. DUNN,

Appellant,

vs.

CEDAR RAPIDS ENGINEERING COMPANY OF DELAWARE, a corporation, and CEDAR RAPIDS ENGINEERING COMPANY, a corporation,

Appellees.

BRIEF OF RAY HOWARD, AMICUS CURIAE.

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TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

CASES.

STATUTES.

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Introduction.

Honorable Albert Lee Stephens has kindly indicated the Court's willingness to accept my brief *Amicus Curiae* on appellant's petition for rehearing. My interest in the question involved is that I am an attorney for the respondent in the pending appeal of *Stafford v. Groff,* No. 2 Civ. 15218 in the District Court of Appeal, Second Appellate District, California. It involves the related question as to the garnishment of a debt owing by a foreign corporation. This interest alone prompted counsel for appellant herein to name me as "of counsel" in this case, which I hope is not in conflict with my position as *amicus curiae.*

Authorities From Other Jurisdictions Not Controlling.

I have read the respective briefs, the petition for rehearing and the reply thereto. I do not feel that I should attempt citation of authorities, whether already cited or not, from other jurisdictions. There seems to be no decision one way or the other in this jurisdiction, bearing on the effect of *Article XII, Section 15, of the Constitution of California,* nor is any similar provision of the constitution or laws of any other state, noticed in any decision in any other jurisdiction. I therefore assume that there was no such provision involved in any of them.

The question then, is an open one in California, in view of that provision. The most that any court has held is that in order to uphold jurisdiction, it must appear that the legislature of the particular state where the action is brought, intended by the language used in its statute corresponding to Sections 405-406(a), C. C., not to exclude, but to include, actions on claims arising out of the state. In the absence of such a constitutional provision in any state whose statute was construed in any of the decisions cited, it cannot be said that there was a holding that its legislature would have intended to make such a limitation had there been such a provision in its constitution.

(The effect of *Miner v. United Airlines,* will be discussed below.)

The Effect of the Constitutional Provision in California.

I now refer to the opening paragraph of appelllees' Introduction and to its Point I at page 3 of the reply. A more accurate statement of "The basis for the petition" should be, as I read the petition:

> "that under Article XII, Section 15, of the California Constitution *it would seem unreasonable to assume that the Legislature intended to provide* for a federal district court sitting in California (or any California court) to refuse to accept jurisdiction in this case."

(The basis does not seem to be only, or necessarily, that it *would be* unconstitutional.)

Appellees apparently understand appellant's reference to the words in Section 15, italicized in their quotation thereof: *"shall be allowed to transact business within this State,"* as a contention that the business *from which the claim sued upon arose,* is the business *transacted* by the foreign corporations. They say that this business was transacted in Iowa and that therefore the constitutional provision obviously does not apply.

But that is not the point which I believe appellants make, nor what I want to emphasize. *The point is,* if appellant's petition does not already make it clear, that the holding and managing of property in California, the conduct of general business and the accumulating of assets therefrom, not connected with the transaction sued upon, is the business to be considered. Its connection with the claim sued upon is slightly indirect, but most important since it involves collecting on the judgment. It concerns a California citizen who sued a foreign corporation on a debt incurred elsewhere, *because those are the assets, and*

possibly the only assets, out of which he can get his judgment satisfied. They certainly should be those most easily reached. Those are the assets which the foreign corporation is privileged, by special permission of California law, to bring into California and to use under the protection of California law, and through the use of California's climate and natural resources. They may be increased possibly many fold, by dealing with the population of California.

Such assets should not be immune from attachment and/or execution on debts in favor of Californians, wherever contracted. If the foreign corporation holding the assets cannot be sued and served in California, they are immune. To hold, manage and use such assets is "to transact business within this State," and to do so without fear of having them taken for its debts wherever contracted, is to do so "on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this state."

As pointed out in the petition for rehearing, a Californian might have a quick and sure remedy against a domestic corporation and against its property, on a debt incurred elsewhere, but would not have it against a foreign corporation or property owned by it adjoining that of the domestic corporation, on a similar debt arising at the same place. Appellees might have given a *partial* answer to this by urging that attachment of the foreign corporation's property and publication of summons against it would be a means of reaching its California assets. But the numerous delays, expense and other limitations on this remedy, complicated by its having agents in California and its probable then contention that it was entitled to personal service, make such remedies much less effective than

those available against domestic corporations. The foreign corporation would still be transacting its business on more favorable conditions than those prescribed for domestic corporations. This factor does away with even the above suggested argument for appellees, which is the only one I believe they could make.

The argument at the bottom of page 3 and page 4 falls also because it overlooks that the point is that the *owning, etc. of property* is transacting business, and assumes that the bringing of suits *by* foreign corporations is claimed by appellants to be the transaction of business.

I close my discussion of this point with the reminder that we are considering what must have been *in the minds of the legislators* in not expressly excluding from the powers of California courts over actions against foreign corporations, those on claims arising elsewhere, as legislatures of some states have done.

The Problem Is Somewhat Peculiar to California.

This is because in California we have always had large numbers of people from other states making their homes here, and naturally they bring with them as part of their estates, claims which arose in their former home states. And, especially lately, we have many foreign corporations locating here, many owing such debts. These people pay for maintaining California courts, and should be entitled to use them.

Foreign corporations are, of course, welcome to their fair share of the climate, etc., above and frequently men-

tioned in California, but let us ask what would be the effect of their asking for special privileges when they file their papers with the Secretary of State. Would this Court compel him to accept a designation of agent on whom process might be served, with the limitation therein that the process could be only on claims arising in the State? And if they can put that limitation in their designation, why could they not insert such other restrictions as they see fit?

Failure of Appellant to Mention Constitution.

It would be unfortunate if the decision of this case as it now reads, should stand as the law and as precedent for the state as well as the federal courts, without reference to the effect of the constitutional provision, for no other reason than that the point had not been brought out in a particular way. The situation differs from that in the cited case of *Mann v. Brison,* 120 Cal. App. 450, 452-3; 7 Pac. (2d) 1110 (rehearing denied at 9 Pac. (2d) 257). In that case it was the claimed unconstitutionality itself of the law in question, which was raised on petition for rehearing. While the petition herein does argue that the reading into Sections 405 and 406(a) C. C. of a limitation to cases arising in this state, *would be* unconstitutional *if written there,* there is no such provision written there and hence no contention that it *is* unconstitutional. The reference to the provision seems to be merely an *additional reason* why it should not be held to have been in the minds of the legislators without being written. As I understand it, appellants have made this contention throughout.

Miner vs. United Airlines.

The opinion of the late District Judge Hollzer in that case (16 Fed. Supp. 930) follows the reasoning of some of the cases from eastern jurisdictions. While we all regard his work very highly, it is of course not controlling on this court. And as it does not take into consideration the California constitutional provision, it is no more persuasive than are the opinions in the cases from other jurisdictions.

The failure of the California legislature to amend the statute during the subsequent ten years, is explainable by the fact that there was nothing to amend. There was no limitation written into it, and, especially in view of the constitution which certainly needs no amending to make its meaning clear, and in view of the absence of any state court decision or of the point even being argued in the many instances, no doubt, when the point could have been raised, there was nothing which it would seem needed to be clarified.

Stafford vs. Groff.

This case not having been decided, nor even briefed, needs no special mention except as the reason for my own interest in the general questions. I might say, however, that appellees confuse the claim on which the principal action is based, with the claim sought to be subjected to attachment. The latter is an oil royalty owing by an Ohio corporation on an oil lease in Illinois to a citizen of that state, the principal action being by a citizen of California against that Illinois citizen on a claim arising in California.

It is submitted that this court should re-write its decision with the foregoing points in mind, as well as giving effect to the California citizenship of the appellant.

February 11, 1946.

Respectfully submitted,

RAY HOWARD,
Amicus Curiae.